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HAROLD B. WILLE

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. 182

METALLIC BUILDING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Metallic Building Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above styled case on June 19, 1953.

OPINIONS BELOW

The Decision and Order of the National Labor Relations Board (Tr., p. 166) is reported in *98 N. L. R. B. No. 64*. The opinion of the United States Court of Appeals (Tr., p. 228) is reported in *204 F. 2d* ..... .

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 19, 1953. The jurisdiction of this court is invoked under *28 U. S. C., Section 1254(1).*

QUESTION PRESENTED

Can an employer be held to have violated *Section 8(a)(3)* of the *Labor Management Relations Act, 1947* (Act of June 23, 1947, Public Law 101, 80th Congress) for discharging an employee for the purpose of discouraging the employee's membership in an organization for which the employee is ineligible for membership.

STATUTE INVOLVED

The pertinent statutory provisions are printed in Appendix A, *infra*, p. 13.

STATEMENT

The General Counsel of the National Labor Relations Board, hereinafter called "Board," through the Regional Director of the Sixteenth Region, issued a complaint, under *Section 10* of the *Labor Management Relations Act, 1947*, hereinafter called "Act," alleging that petitioner had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. (Tr., p. 9.)

A hearing in this matter was conducted from September 20 through September 29, 1949. On October 25, 1949, the General Counsel of the Board filed a motion to reopen the hearing, and on November 21, 1949, the Trial Examiner

granted said motion. The hearing was reopened on December 19, 1949, and continued through December 20, 1949. (Tr., pp. 175-177.)

On March 20, 1950, the Trial Examiner issued his Intermediate Report (Tr., p. 217), and on said date the case was transferred to the Board. (Tr., p. 85.)

The Trial Examiner found that petitioner had not violated Section 8(a)(3) of the Act with respect to three named dischargees, but that with respect to two named dischargees petitioner had violated Section 8(a)(3) of the Act. In that connection the Trial Examiner stated that petitioner, "by discharging Hugo S. Baker and L. B. Hightower under the circumstances appearing in this case, violated Section 8(a)(3) of the Act" (Tr., p. 207), and concluded, "By discriminating in regard to the hire and tenure of employment of Hugo S. Baker and L. B. Hightower, *thereby discouraging membership in Houston Metal Trades Council, A. F. L.*, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act." (Emphasis ours.) (Tr., p. 214.) Although the Trial Examiner found that petitioner had violated Section 8(a)(1) of the Act in several independent instances, he did not find that the discharge of Baker and Hightower constituted violations of Section 8(a)(1).

On February 29, 1952, the Board issued its order affirming the Intermediate Report of the Trial Examiner (Tr., p. 166), in which order the Board adopted the findings, conclusions, and recommendations of the Trial Examiner,

with certain additions and modifications not here pertinent.

On December 22, 1952, the Board filed with the United States Court of Appeals for the Fifth Circuit its Petition for Enforcement of its Order of February 29, 1952, and on June 19, 1953, said Court entered its judgment enforcing said Order of the Board.

The charge (Tr., p. 4) and the complaint (Tr., p. 9) alleged that petitioner discriminated against Baker and Hightower by discharging them, and further alleged that the purpose of the discrimination was to discourage membership in the Houston Metal Trades Council. The Board in its opinion found these allegations to be true as did the Honorable Court of Appeals. The uncontradicted facts show that it was impossible for Baker and Hightower to become members of the Houston Metal Trades Council. The uncontradicted facts further show that the Houston Metal Trades Council was an organization of affiliated labor unions, and that *no individual was eligible for membership therein.* (P. A., p. 43.)

Petitioner took the position that if Baker and Hightower could not become members of the Houston Metal Trades Council that any discrimination could not have as its purpose the discouragement of membership therein, and absent such purpose no violation of Section 8(a)(3) of the Act did or could occur.

The United States Court of Appeals below, although conceding said facts, held that the action of petitioner in

discharging Baker and Hightower was "within the mischiefs aimed at by Sec. 8(a)(3)." (Tr., p. 232.)

To justify enforcing the Board's Order it was necessary that the Honorable Court below find that the action of petitioner constituted a violation of Section 8(a)(3), because the Board had not found that the discharge of Baker and Hightower constituted a violation of Section 8(a)(1) independent of Section 8(a)(3), and there was thus no basis for a reinstatement and back pay order unless a violation of Section 8(a)(3) was sustained.

This then explains the necessity of the strained language of the Honorable Court below in finding the action of petitioner within the "*mischief*" aimed at by Section 8(a)(3), rather than within the clear wording of the statute.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In holding that petitioner is guilty of violating Section 8(a)(3) of the Act.

2. In holding that the discharge of an employee for activities on behalf of an organization for which the employee was ineligible for membership was a violation of Section 8(a)(3) of the Act.

3. In failing to hold that proof of encouragement or discouragement of membership in a labor organization was essential to establish a violation of Section 8(a)(3) of the Act.

4. In holding Houston Metal Trades Council to be a labor organization within the meaning of Section 2(5) of the Act.

5. In enforcing that portion of the Board's Order calling for reinstatement and back pay.

REASONS FOR GRANTING THE WRIT

1. The decision in this case in the Court below is directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in the case of *National Labor Relations Board v. Reliable Newspaper Delivery, Inc., 187 F. 2d 547 (1951)*, and with the decision of the United States Court of Appeals for the Eighth Circuit in the case of *National Labor Relations Board v. Del E. Webb Const., Co., et al., 196 F. 2d 702 (1952)*.

In the *Reliable* case the employer had fourteen employees, six of whom were union members and the remaining eight non-union. The employer had a contract with the union, and pursuant to negotiations under the contract granted a retroactive pay increase to the union employees, but not to the non-union employees. *The union was a closed union and the non-union employees were not eligible for membership therein.* The Board held that the employer had violated Section 8(a)(3) of the Act by giving the retroactive pay increase to the union employees while denying it to the non-union employees. The Court in setting aside the Board's order stated in its opinion:

> "* * * It leaves as the only question confronting us, whether, under all the circumstances, the employer's action in allowing the back pay differential to its union employees and not making the same sort of pay-

ment to its non-union personnel violated the Act as was found by the Board * * *.

"The Board argues that 'discrimination' is the key word of the statute. **It refuses to accept the plain language of 8(a)(3) which makes the particular offense encouragement or discouragement of membership in any labor organization by means of discrimination in regard to hire or tenure of employment or any term or condition of employment** * * *.

"Even if we should assume that the disparity brought about by the retroactive payments amounted to discrimination, then, under the statutory language, we must go further and ascertain whether that discrimination encouraged membership in the Newspaper and Mail Deliverers' Union of New York and vicinity. And *we do not find substantial evidence of that encouragement.* * * * The consequence of the delivery company living up to its obligation might cause its non-union employees to feel badly that the union would not permit them to join it and thereby enable them to share in the windfall. That result, however, cannot be here reasonably construed as evidence of an 8(a)(3) violation by the company because *the assumed discrimination, under the peculiar uncontroverted facts, has not in this instance produced the statutory offense of encouraging membership in the deliverers' union.* It would be necessary for us to completely close our eyes to the admitted facts in order to accept the Board's statement that the inevitable effect of the back wage payment was to encourage union membership because we know that *membership in the union for non-union workmen was a practical impossibility.*

"* * *.

"Generally speaking, the proposition that in order to establish an 8(a)(3) violation there must be evidence, that the employer's act encouraged or discour-

aged union membership has widespread support. In National Labor Relations Board v. Air Associates, Inc., 2 Cir., 121 F. 2d 586, the court held at page 592: 'Section 8(3) requires that the discrimination in regard to tenure of employment have both the purpose and effect of discouraging union membership.' The later decision in that same circuit, National Labor Relations Board v. Cities Service Oil Co., 129 F. 2d 933, 937, in no way restricted that language. In Stonewall Cotton Mills, Inc. v. National Labor Relations Board, 5 Cir., 129 F. 2d 629, the Board had found certain lay offs and discharges to have been in violation of Section 8(3). The court said, 129 F. 2d at page 632: 'To make out a case under it [Section 8(3)], it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged, membership in any labor organization.' This conclusion was not disturbed by the motion for rehearing, 129 F. 2d 633, which was disposed of entirely upon evidential grounds. To the same effect see National Labor Relations Board v. Draper Corporation, 4 Cir., 145 F. 2d 199, 202, 156 A. L. R. 989; Western Cartridge Co. v. National Labor Relations Board, 7 Cir., 139 F. 2d 855, 858; National Labor Relations Board v. Reynolds International Pen Co., 7 Cir., 162 F. 2d 680, 690; Wells, Inc. v. National Labor Relations Board, 9 Cir., 162 F. 2d 457, 459, 460; National Labor Relations Board v. Robbins Tire & Rubber Co., Inc., 5 Cir., 161 F. 2d 798, 801.

"* * *.

"A decree will be entered setting aside the order of the National Labor Relations Board." (Emphasis ours.)

The *Reliable* case was quoted from and followed in the *Webb* case wherein the Board had held the employer and union guilty of violating Section 8(a)(3) of the Act for

the discharge of one Pickard, because he belonged to Local 101-B of the union, and did not belong to Local 101 of the union. Before Pickard could join Local 101 it was necessary that he serve five years apprenticeship and show skill in several types of machines. It was found that he had not served a five years apprenticeship, and was not skilled as an operator of sufficient types of machines, and, therefore, *was not eligible for membership in Local 101.* The Board found that the discriminatory discharge of Pickard tended to encourage membership in Local 101, and tended to discourage membership in Local 101-B. The Court in denying the Board's petition to enforce stated on page 705 of the decision:

> "* * * In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Pickard could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed at least by any act of the respondent company. *It can scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing.*
>
> "* * * (citing and quoting from *Reliable Newspaper* case.)
>
> "So in the instant case, it being impossible for Pickard to become a member of the respondent union, nothing that respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which was impossible for him to join. There can be no violation of this stat-

> ute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. (Cases cited.)" (Emphasis ours.)

Since Baker and Hightower were not and could not become members of Houston Metal Trades Council under any circumstances, any discrimination, if such occurred, could not have as its purpose nor could it proximately cause encouragement or discouragement of membership in Houston Metal Trades Council. Discrimination alone does not constitute a violation of Section 8(a)(3). In order to support the legal conclusion of a violation of Section 8(a)(3) of the Act, there must be a finding that discrimination occurred, and that the discrimination was for the purpose of encouraging or discouraging membership in Houston Metal Trades Council. Absent such a finding of fact the legal conclusion of a violation of Section 8(a)(3) of the Act cannot stand. The Honorable Court below, being unable to cite any decisions in support of its stand in this case, in effect acknowledged that it was going contrary to the Third and Eighth Circuits in the following language:

> "In reaching this conclusion we have not been unmindful of the two decisions, the one from the Third (*Reliable Newspaper* case), the other from the Eighth (*Webb* case), Circuit, on which respondent relies. Neither of these cases, in our opinion, supports respondent's position, indeed we think neither is in point. But if we are wrong in this view and these cases do, either in what is decided or in what is said arguendo, furnish support for the contention respon-

dent makes, to the extent that they do we must withhold our approval of them." (Tr., p. 232.)

The statement by the Honorable Court below that the *Reliable* case and the *Webb* case are not in point with the case at bar is without merit. Both the *Reliable* and *Webb* cases clearly hold that it is not a violation of Section 8(a)(3) of the Act for an employer to discriminatorily discharge an employee for the purpose of discouraging his activities or membership in a labor organization, if in fact the employee is not eligible for membership in the organization. In the case at bar the Honorable Court below recognized, as the undisputed facts show, that Baker and Hightower were ineligible for membership in the Houston Metal Trades Council. Yet, in spite of this, they held that the discharge of these employees discouraged membership in the Houston Metal Trades Council, and thus constituted a violation of Section 8(a)(3) of the Act.

Thus it is that the decision by the Honorable Court below is directly in conflict with the *Newspaper* case by the Third Circuit Court, and the *Webb* case by the Eighth Circuit Court, the Eighth Circuit having followed the Third Circuit on this point. This Honorable Court has not passed on this point of law.

Therefore, there exists a direct conflict between decisions of Courts of Appeals on the same matter of federal law, which this Honorable Court should resolve by granting this petition for a writ of certiorari.

2. The action of the Honorable Court below in holding that the action of petitioner in this case was "within the

mischiefs aimed at by Sec. 8(a)(3)," constitutes an unwarranted extension of a federal statute whose bounds have been through the years reasonably well defined by the courts. If said decision be allowed to stand it becomes not only necessary for an employer considering his relations with his employees to study the language of the statute and the numerous, varied and often complicated decisions construing said language, but must now, at least if he lives in the Fifth Circuit, decide whether his action or contemplated action is a "mischief" aimed at by the statute.

In handing down its opinion in the case at bar the Honorable Court below has so far departed from the accepted construction of the Act as to justify this Honorable Court in exercising its power of supervision, and in granting this petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 13, 1953

APPENDIX A

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. I, Sec. 141, et seq.

"Sec. 2. When used in this Act—

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"* * *

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *"